Office-Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1213

IN THE

Supreme Court of the United States

October Term, 1984

CAR CARRIERS, INC., ET AL.,

Petitioners,

v.

FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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16 pp

QUESTION PRESENTED

WHETHER THE DISMISSAL OF THE ANTITRUST COUNT IN PETITIONERS' COMPLAINT FOR FAILURE TO STATE A *PER SE* VIOLATION OF THE SHERMAN ACT, OR TO ALLEGE ANY INJURY TO COMPETITION, WAS CONSISTENT WITH THE DECISIONS OF THIS COURT.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

SUPPLEMENTAL STATEMENT OF THE CASE

This case arose from the setting of a former supplier[1] alleging that a purchaser[2] transferred its patronage to a replacement supplier[3] pursuant to a conspiracy. The facts alleged in the Complaint were assumed by the courts below to be correct, as they are for purposes of this Brief in Opposition to the Petition for a Writ of Certiorari. Dismissal of the Complaint was unanimously

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[1] Plaintiffs-Petitioners, collectively referred to herein (as in the courts below) as "Car Carriers."

[2] Defendant-Respondent Ford Motor Company, referred to herein as "Ford."

[3] Defendant-Respondent Nu-Car Carriers, Inc., referred to herein as "Nu-Car."

upheld by a panel of the Seventh Circuit Court of Appeals, and no judge voted for rehearing en banc.

The Complaint alleged that Ford, in purchasing transportation services from a number of suppliers, effectively "dictated and controlled" the rates Ford paid to them, and terminated or otherwise dealt severely with those who sought rates Ford deemed to be excessive. The Complaint alleged that Ford's 1981 decision to accept Nu-Car's "predatory" lower rates, and transfer its Chicago haulaway transport business from Car Carriers to Nu-Car, was based on a conspiracy entered at least six years earlier with Nu-Car and with other carriers who, like Car Carriers, bid unsuccessfully for that business. Although the conspiracy purportedly was intended to force Car Carriers to sell its assets to Nu-Car, Ford allegedly prevented this from occurring. (Complaint ¶¶ 19, 20; A.36-40)[4] The sole alleged effect on competition from the conspiratorial acts was that "competition in the business of providing haulaway transport services for new Ford automobiles has been restrained." (Complaint ¶ 21; A.40)

Ford moved to dismiss Petitioners' antitrust count for failure to state a claim upon which relief could be granted on the grounds, *inter alia*, that the Complaint alleged an injured "market" consisting solely of Ford itself, which had sufficient power to prevent its carriers from charging supracompetitive rates. The antitrust count was dismissed because, as the Seventh Circuit found, it did not state a *per se* violation of the antitrust laws and:

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[4] References to the Appendix included with the Petition are cited herein as "A.__".

> The fatal flaw in these pleadings is the absence of any allegation, either direct or inferential, of an anticompetitive effect.

745 F.2d at 1109 (A.14).

REASONS FOR DENYING THE WRIT

Car Carriers' Petition fails to meet the standards of Supreme Court Rule 17.1 which sets forth the factors to be considered in passing upon petitions for writs of certiorari. Petitioners offer no "special and important" reasons for granting the writ of certiorari, as required by the rule. The sole reason offered is a specious conflict between the opinion below and certain of this Court's decisions, although no judge below was persuaded that such a conflict existed. On the contrary, the Seventh Circuit's opinion was wholly consistent with this Court's requirements for a Sherman Act claim on either a *per se* or Rule of Reason basis.

A. THE SEVENTH CIRCUIT PROPERLY APPLIED THIS COURT'S STANDARDS FOR STATING A SHERMAN ACT CLAIM UNDER A *PER SE* OR RULE OF REASON STANDARD.

This Court has unequivocally required anticompetitive market impact as a necessary predicate to any violation of Section 1 of the Sherman Act. Under the Rule of Reason, it is an element that must be alleged and proved. Market injury need not be proved in the case of a *per se* violation; not because it is not required, but because experience has shown it will inevitably result in such cases. As the Court recently explained:

> Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." . . .

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But *whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same* — whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.
>
> * * *
>
> . . . "[C]ongress designed the Sherman Act as a 'consumer welfare prescription.'" A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.

National Collegiate Athletic Association v. *Board of Regents*, ___ U.S. ___, 52 U.S.L.W. 4928, 4933-34 (1984) (citations omitted, emphasis added).

The Seventh Circuit carefully examined the averments of the Complaint under both *a per se* and Rule of Reason analysis, and concluded that Petitioners could not state a claim under either. The Petition does not take issue with the Seventh Circuit's Rule of Reason analysis, which concluded:

> [T]he complaint does not in any way set forth facts to support the conclusion that this putative conspiracy had any anticompetitive effect. Specifically, there are no allegations that, having terminated Car Carriers in favor of Nu-Car, Ford [the sole consumer in the alleged "market"] was compelled, or would be compelled, to pay prices

> that were not the result of the competitive process.

745 F.2d at 1109-10 (A.15).

As they did unsuccessfully in the lower courts, Car Carriers again contend that no injury to the market is necessary, and that they were required only to allege "a combination and conspiracy between Ford and other Ford carriers to eliminate and destroy the transport business of petitioners . . . and damage sustained by petitioners as a consequence," citing *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and *Radovich* v. *National Football League*, 352 U.S. 445 (1957) (Pet. at 6-9). These cases involved classic horizontal group boycott conduct that "falls within one of the 'classes of restraints which from their "nature or character" [are] unduly restrictive, and hence forbidden . . .'" *Radiant Burners*, 364 U.S. at 659 (quoting *Klor's*, 359 U.S. at 211). That is to say, each of those cases involved recognized *per se* violations which will *inevitably* have anticompetitive market impact.

In *Radiant Burners*, competitors of the plaintiff conspired with gas companies to prevent consumers from using the plaintiff's burner. In *Klor's*, the plaintiff's suppliers conspired together and with its competitor to prevent the plaintiff from obtaining merchandise to sell to the public. In *Radovich*, football leagues conspired to prevent their teams from employing those who had played in a competing conference in order to deprive spectators of competing leagues. The facts in these cases differ fundamentally from those alleged in the Complaint in this case. Because the Complaint defines a "market" in which Ford is the only purchaser, any decision by Ford to use one supplier rather than another will by definition "eliminate" the disfavored supplier from the market.

As many courts have held, a "conspiracy" with a buyer or seller to deal with it rather than another is not a *per se* violation of the Sherman Act. *See, e.g., Dunn & Mavis, Inc.* v *Nu-Car Driveaway, Inc.*, 691 F.2d 241 (6th Cir. 1982); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975). In an effort to avoid the holdings in such cases, Car Carriers alleged not only a conspiracy involving Ford and Nu-Car (who won the bid to replace Car Carriers) but a curious "horizontal" conspiracy which included other carriers (who, like Car Carriers, also lost the Chicago bid to Nu-Car).[5] In effect, Car Carriers argued that a total lack of injury to competition could be alchemized into a *per se* violation merely by alleging that Ford conspired with losing bidders as well as with the winning bidder. The Seventh Circuit opinion followed well-accepted authority construing the requirements of *per se* offenses in finding that no claim under the Sherman Act was stated by this allegation.

Under Car Carriers' unduly broad reading of *per se* violations, purchasers would be barred from ever entering into exclusive supply arrangements in which the original supplier of services is replaced under an agreement with two or more sellers by which the buyer's requirements will be met — regardless of the arrangements' potential pro-competitive benefits. *See Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 329-34 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293, 306-07

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[5] The belated suggestion in Footnote 2 of the Petition of "market allocation" of Ford's shipping needs among carriers disregards the Complaint's allegation that Ford had power to control the "allocation" of its business among its suppliers.

(1949). The unprecedented rule that Car Carriers would have this Court espouse would interfere with a broad spectrum of wholly legitimate business relationships and ignore longstanding Rule of Reason treatment of exclusive dealing. *Per se* treatment should be accorded only to conduct that, according to long judicial experience, inevitably restrains trade without offering offsetting benefits. *See Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Car Carriers has failed to plead any such conduct in this case.

The Seventh Circuit correctly identified Petitioners' invocation of *per se* authorities as an effort in mislabeling, closely following this Court's warning in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977), that *per se* treatment must be "based upon demonstrable econonic effect rather than . . . upon formalistic line drawing."

B. THE SEVENTH CIRCUIT'S DISMISSAL OF THIS CASE, IN ACCORDANCE WITH THE FEDERAL RULES, POSES NO CONFLICT WITH THIS COURT'S DECISIONS.

The second alleged conflict with this Court's decisions advanced by the Petition is that the Seventh Circuit's opinion "conflicts in principle with the decisions of this Court in *Conley* v. *Gibson*, 355 U.S. 41 (1957) and *Poller* v. *Columbia Broadcasting Sys.*, 368 U.S. 464 (1962)." (Pet. 9). Again, no conflict exists. As the Seventh Circuit correctly recognized, *Conley* does not stand for the proposition that a complaint is sufficient if some unpleaded claim could be formed under some unalleged set of facts. Rather, while the complaint "need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided," a complaint is only sufficient if *its allega-*

tions would state a claim if supported by the facts. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216 at 120-21 (1969).

In *Conley*, the Court held that a cause of action would be stated *"[i]f these allegations are proven."* 355 U.S. at 46 (emphasis added). Thus, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Wright & Miller, *supra*, at 123 (cited in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246 (1980)). *See also In Re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. granted on other grounds and dismissed*, 103 S. Ct. 3100 (1983).

While this Court has admonished that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), in this case both the district court and the Seventh Circuit indulged every presumption in favor of the Complaint.[6] Mindful of the Court's admonition in *Poller*, the Seventh Circuit expressly stated that its dismissal was not based upon a finding that the Complaint's allegations of concerted action were deficient (745 F.2d at 1107 n.4; A.10), but on its finding that those allegations, even if proved, could not state a *per se* violation or allege the requisite anticompetitive effect of a Rule of Reason claim. (745 F.2d at 1109-14; A.14-15) Thus, Car Carriers' Complaint was dismissed

[6] The district court even went so far as to permit Car Carriers to "flesh out" their boilerplate conspiracy claim in their briefs, which contained additional allegations wholly outside the Complaint itself. (561 F. Supp. at 886 n.2; A.22)

not for vagueness of expression, but because Car Carriers' own allegations made it clear that they could not state a Sherman Act claim. Dismissal of Car Carriers' Complaint was fully warranted under Fed. R. Civ. P. 12(b)(6), and therefore, the Seventh Circuit's affirmance of that dismissal presents no controversy worthy of this Court's discretionary review.

CONCLUSION

For the foregoing reasons, respondent Ford Motor Company respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 26, 1985

APPENDIX

LIST OF SUBSIDIARIES
(Other than Wholly Owned Subsidiaries)
AND AFFILIATES OF FORD MOTOR COMPANY
(U.S. Sup. Ct. Rule 28.1)

The principal affiliates and subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealers of Ford products) are as follows:

Ford Motor Company of Canada, Limited
Oakville, Ontario, Canada

Ford Brasil, S.A. Sao Bernardo Do Campo, Brazil

Ford-Werke, A.G. Cologne, Germany

Ford Motor Company (Belgium) N.V.
Antwerp, Belgium

Ford Motor Company A/S Copenhagen, Denmark

O/Y Ford A/B Helsinki, Finland

Ford Motor Company Aktiebolag
Stockholm, Sweden

Ford Nederland B.V. Amsterdam, The Netherlands

Eleveth Taconite Company Eveleth, Minnesota

Ford Lio Ho Motor Company Ltd. Taipei, Taiwan

Fairlane Town Center (A Partnership)
Dearborn, Michigan

Renaissance Center Partnership
Dearborn, Michigan

Fairlane Woods Associates (A Partnership)
Dearborn, Michigan